

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KEITH D. NELSON, :

Movant, :

vs. : 4:04-CV-8005 (FJG)
99-cr-00303-W (FJG)

UNITED STATES OF AMERICA, :

Respondent. :

MOTION TO WAIVE MOVANT'S PRESENCE AT 2255 HEARING

COMES NOW Keith D. Nelson, by his attorneys, David A. Ruhnke and Gary E. Brotherton, and moves for permission to waive his appearance at the 2255 hearing in this matter. In support of the motion, Movant relies on the following:

1. This Court has scheduled hearings on Movant's 2255 petition to commence on June 14, 2010. In two recent lengthy visits with Movant at his place of incarceration, undersigned counsel David A. Ruhnke and Movant have discussed whether Movant wishes to be present during the hearings. Movant has stated to counsel that, although he has been informed he has right to be present at the hearing, he wishes to absent himself from that process.

2. The Rules Governing 2255 Proceedings do not make any provision, one way or another, for the presence of the moving party if a hearing is to be conducted. Rule 12 of

those rules, however, provide that the Federal Rules of Criminal Procedure, to the extent not inconsistent with the 2255 Rules, “may be applied to a proceeding under these rules.” Accordingly, F.R.Crim.P. 43 may be looked to as controlling this question since nothing in Rule 43 is inconsistent with the 2255 Rules. Rule 43, of course, allows a defendant to absent himself voluntarily from the proceedings. F.R.Crim.P. 43(c)(1)(C).

3. Movant has been informed that his counsel are of the belief that this Court will want to assure itself that Movant’s decision is a knowing and voluntary one and that Movant is mentally competent to make such a decision. Movant has been further advised that the Court would likely wish to engage in colloquy with Movant prior to accepting a waiver of his presence at the hearings. It is noted that the Bureau of Prisons facility at which Movant is housed is equipped with video tele-conferencing equipment and that several inmates on the federal death row at USP/Terre Haute have made court “appearances” utilizing video-conferencing. It is respectfully submitted that the Court may wish to avail itself of that technology in order to satisfy itself that Movant’s waiver of his appearance is knowing, voluntary and that Movant is competent to make such a decision. Alternatively, if directed to do so by the Court, counsel will obtain a written waiver from Movant.

WHEREFORE, it is respectfully requested that this Court order that a suitable inquiry be undertaken regarding the position of Movant, expressed to the Court through Movant's counsel, that he should be permitted to waive his presence at the 2255 hearing.

Respectfully submitted,
Co-counsel to Movant

/s/ David A. Ruhnke
Ruhnke & Barrett
47 Park Street
Montclair, New Jersey 07042
(973)744-1000
(973)746-1490
davidruhnke@ruhnkeandbarrett.com

/s/ Gary E. Brotherton
Legal Writes, LLC
601 W. Nifong Blvd.
Building 1, Suite C
Columbia, MO 65202-3381
(573)875-1571
(573)875-1572 (fax)
gebrotherton@legalwritesllc.com

Filed via ECF: Kansas City, Missouri
April 10, 2010

CERTIFICATE OF SERVICE

This will certify that, on today's date, this notice was served upon the United States by filing via ECF.

/s/ David A. Ruhnke
DAVID A. RUHNKE

Dated: April 10, 2010